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SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979
NO. 79-460

EDGAR SANCHEZ,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Edgar Sanchez, petitioner herein, respectfully prays that a writ of certiorari be issued to review an order of the Appellate Division, First Department, of the Supreme Court of the State of New York, which affirmed a judgment of the Supreme Court, New York County, convicting the petitioner of the crimes of Criminal Possession of a Controlled Substance in the Fifth and Seventh Degrees



under sections 220.09 and 220.03 of the New York Penal Law.

Petitioner was arrested on January 13, 1977. A trial was held commencing March 30, 1978 and the petitioner was convicted as charged by a jury verdict. He was thereafter sentenced to terms of up to three years and one year to run concurrently. The petitioner's conviction was affirmed by the Appellate Division, First Department, on May 10, 1979. Leave to appeal to the New York Court of Appeals was denied on June 22, 1979. The petitioner has now exhausted all state remedies.

## OPINIONS BELOW

The opinion and order of Judge Goodman with respect to the petitioner's pretrial motion to suppress evidence is not officially reported. A copy is set forth in Appendix A. The Appellate Division's affirmance of the petitioner's conviction was without opinion, and a copy of the order is set forth in Appendix B. The order of the New York Court of Appeals denying leave to appeal is set forth in Appendix C. The Appellate Division and New York Court of Appeals orders have not yet been officially reported.

## JURISDICTION

The Appellate Division's order was entered on May 10, 1979. The order of the New York Court of Appeals denying leave to appeal was dated June 22, 1979. The petitioner is therefore timely filing this application for a writ of certiorari and jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

## QUESTIONS PRESENTED

1. Whether the stopping of the petitioner's vehicle by police and the subsequent attempted search of his person, based solely upon information of an anonymous informant that "a male Puerto Rican driving a white Grand Prix Pontiac with a black top would be carrying a gun" was violative of the petitioner's constitutional rights against unreasonable search and seizure.

2. Whether the failure of petitioner to fully comply with New York statutory procedures for obtaining a pretrial hearing on an alleged violation of constitutional rights constitutes a waiver of those rights even though the issue was fully raised and developed during the course of the trial.



## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions involved in this case are the Fourth and Fourteenth Amendments to the United States Constitution. Statutes involved are sections 710.60 and 710.70 of the New York State Criminal Procedure Law.

## STATEMENT

In the case at bar defense counsel prior to trial, in a motion dated May 24, 1977, requested a suppression hearing on the issue of improper search and seizure of physical items pursuant to applicable sections of the New York Criminal Procedure Law. The prosecution, in a reply affidavit, opposed said request on the grounds that the "supporting affidavit by defense counsel did not raise issues of fact such as to put in issue the question of a possible violation of constitutional rights". In addition, the assistant district attorney argued that "there were no sworn allegations of fact". Judge Goodman, of the New York State Supreme Court, in an order of August 23, 1977, evidently relying on the district attorney's argument, denied the motion to suppress, stating that "there are no facts raised by the defense to warrant a suppression of evidence". The

court granted leave to renew upon a proper showing of issues of fact. (See order of Judge Goodman - Appendix A).

During the trial defense counsel learned for the first time, from a statement by the assistant district attorney, that the only reason that appellant had been stopped by the police officers was information that they had received from someone that the appellant was carrying a gun (Trial Min., p 2). Later in the trial, during cross-examination of Sergeant Forzano, defense counsel learned that the sum total of information from an anonymous informant was that "a male Puerto Rican driving a white Grand Prix Pontiac with a black top would be carrying a gun" (Trial Min., pp 156,157). Based upon this discovery defense counsel raised for the trial court's consideration the impropriety of the initial stopping of the vehicle and the attempted search of the appellant's person* (Trial Min., pp 181-187). Defense counsel aptly pointed out that since his client's position was that he had not possessed any drugs, neither he nor his client were in any position prior to learning of Sergeant Forzano's testimony to know upon what basis the officers initially decided to stop his vehicle.

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* Detective Mauriello clearly stated that he made a move toward Sanchez with the intention of frisking him (Trial Min., p 36).



Thus defense counsel argued that the initial denial of his motion was based upon the impossible requirement that he disclose alleged facts which were not within his knowledge. During the course of the trial, defense counsel specifically told the court that "the issue of the legality of the search is always before the court" (Trial Min., p 186). The State Courts below in reviewing the case at bar appear to have adopted the prosecutor's argument that the failure to precisely follow statutory procedures as outlined in section 710.60 of the Criminal Procedure Law of New York constitutes a waiver of petitioner's rights.

Petitioner thus seeks review by this Court in a writ of certiorari because of the novel issue of waiver presented herein. This Court has always set high standards of proof with respect to waiver of constitutional rights. See Johnson v Zerbst, 304 US 458. In the case at bar, the issue of an illegal search and seizure was clearly raised at trial by defense counsel and through the testimony of police officers who testified.

In Dibella v United States, 369 US 126 (1962), this Court clearly indicated in its opinion that the legality of a search can always be raised even during the course of the trial. This Court stated at page 129:

> " . . . the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light." (Citing In re Milburne, 77 F2d 310 (1935) and Grant v United States, 291 F2d 227 (1961).)

In Rouse v United States, 359 F2d 1014 (1966), the Court of Appeals for the District of Columbia relying on the Dibella case, supra, stated at pages 1015-16:

> "(1) A pre-trial ruling on a motion to suppress does not bind the trial judge in all circumstances. New facts, new light on the credibility of government witnesses, or other matters appearing at trial may cast reasonable doubt on the pre-trial ruling. It then becomes the duty of the trial judge to consider de novo the issue of suppression and, if necessary, hold a hearing out of the presence of the jury."

(See, also, People v Butler, 415 P.2d 819 (Cal Sup Ct., 1966).)



In the case at bar, the facts indicating that an illegal search and seizure had taken place did not appear until the testimony of police officers at trial. Their testimony that the sole reason for stopping the petitioner was information from an anonymous informant that "a male Puerto Rican driving a white Grand Prix Pontiac with a black top would be carrying a gun" (Trial Min., pp 156,157), clearly reveals an insufficient basis to support the police conduct in the case at bar. Although an investigative stop requires less than probable cause and may be made on information supplied by another person, an informant's tip must carry sufficient indication of reliability to justify the forcible encounter. (Adams v Williams, 407 US 146; People v Moore, 32 NY2d 67; People v Lypka, 36 NY2d 210).

In the case at bar the petitioner was ordered to halt his vehicle, all three officers surrounded his car, he was asked for his license and registration and Detective Mauriello specifically testified that he "made a move toward the petitioner with the intention of frisking him (Trial Min., pp 35,36). Thus, in effect, the petitioner and his vehicle were literally accosted, restrained and seized. (Terry v Ohio, 392 US 1; People v Ingle, 36 NY2d 413). This intrusion upon an individual's liberty occurred

on insufficient grounds to satisfy constitutional requirements.

It is respectfully urged that the case at bar presents important and novel issues which warrants this Court's further consideration.

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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## APPENDIX A -

DECISION AND ORDER OF JUSTICE GOODMAN IN THE SUPREME COURT, NEW YORK COUNTY, AUGUST 23, 1977.

At a Criminal Term of the Supreme Court of the State of New York, held in and for the County of New York, City of New York, on the 23rd day of August, 1977.

PRESENT:
HON. BUDD GOODMAN
Justice

Indictment No. N1433/77
Motion To Suppress Evidence
(SAME TITLE)

The motion to suppress physical evidence is denied. There are no facts raised by the defense to warrant a suppression of evidence; however, leave to renew the motion may be granted upon a proper showing of issues of fact.

E N T E R

s/ B. G.
J.S.C.

APPENDIX B -

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, MAY 10, 1979.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 10th day of May, 1979

Present-Hon. Harold Birns, Justice Presiding
Arnold L. Fein
Leonard H. Sandler
Max Bloom
Myles J. Lane Justices

The People of the State of New York,

Respondent,

-against-

Edgar Sanchez,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Dickens, J., at trial and sentence; Goodman, J., on motion to suppress), rendered on May 31, 1978 convicting defendant of criminal possession of a controlled substance in the fifth and seventh degrees,



and said appeal having been argued by Mr. Spiros A. Tsimbinos of counsel for the appellant, and by Mr. Michael E. Norton of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI

Clerk.

APPENDIX C -

OPINION OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK DENYING LEAVE
TO APPEAL.

BEFORE:HON. SOL WACHTLER, Associate Judge

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THE PEOPLE OF THE STATE OF NEW YORK

against

EDGAR SANCHEZ

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CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
June 22, 1979

s/ Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, New York County, May 31, 1978; affirmed and case remitted to Supreme Court, for further proceedings pursuant to CPL 460.50(5), Appellate Division, First Department, May 10,1979.



APPENDIX D -

New York State Criminal Procedure Law, section 710.60:

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three of section 710.20.

4. If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision two of section 60.20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact.

5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.



6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

* * * * * *

New York State Criminal Procedure Law, section 710.70:

1. Upon granting a motion to suppress evidence, the court must order that the evidence in question be excluded in the criminal action pending against the defendant. When the order is based upon the ground specified in subdivision one of section 710.20 and excludes tangible property unlawfully taken from the defendant's possession, and when such property is not otherwise subject to lawful retention, the court may, upon request of the defendant, further order that such property be restored to him.

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

3. A motion to suppress evidence made pursuant to this article is the exclusive method of challenging the admissibility of evidence upon the grounds specified

in section 710.20, and a defendant who does not make such a motion before or in the course of a criminal action waives his right to judicial determination of any such contention.

Nothing contained in this article, however, precludes a defendant from attempting to establish at a trial that evidence introduced by the people of a pre-trial statement made by him should be disregarded by the jury or other trier of the facts on the ground that such statement was involuntarily made within the meaning of section 60.45. Even though the issue of the admissibility of such evidence was not submitted to the court, or was determined adversely to the defendant upon motion, the defendant may adduce trial evidence and otherwise contend that the statement was involuntarily made. In the case of a jury trial, the court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made.